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Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*

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I. INTRODUCTION

Conflict is inevitable, but efficient and fair resolution is not. Conflicts can persist even though there may be any number of possible resolutions that would better serve the interests of the parties -- the recent history of ethnic and religious strife in Lebanon, Israel, Cyprus, and Yugoslavia serves as a reminder of this. In our everyday personal and professional lives, we have all witnessed disputes where the absence of a resolution imposes substantial and avoidable costs on all parties. Moreover, many resolutions that are achieved -- whether through negotiation or imposition -- conspicuously fail to satisfy the economist's criterion of Pareto efficiency. Let me offer a few examples where, at least with the benefit of hindsight, it is easy to identify alternative resolutions that might have left both parties better off.

My first example involves a divorcing family in California who were part of a longitudinal study carried out by Stanford psychologist Eleanor Maccoby and me.[1] Mary and Paul Templeton spent three years fighting over the custody of their seven year- old daughter Tracy after Mary filed for divorce in 1985. Mary wanted sole custody; Paul wanted joint physical custody. This middle-income family spent over $37,000 on lawyers and experts. In the process, they traumatized Tracy and inflicted great emotional pain on each other. More to the point, the conflict over who would best care for their daughter damaged each parent's relationship with Tracy, who has suffered terribly by being caught in the middle of her

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1. The results of our full study, which involved some 1100 families, are described in ELEANOR MACCOBY & ROBERT MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY (1992).

parents' conflict. Ultimately the divorce decree provided that Mary would have primary physical custody of Tracy, and Paul would be entitled to reasonable weekend visitation. The parents' inability to negotiate with one another led to a result in which mother, father, and daughter were all losers.

A conflict between Eastern Airlines and its unions represents another conspicuous example of a lose-lose outcome. In 1986, Frank Lorenzo took over Eastern, then the eighth largest American airline, with over 42,000 employees and about 1,000 daily flights to seventy cities. For the next three years, Lorenzo, considered a union buster by organized labor, pressed the airline's unions for various concessions, and laid off workers to reduce costs. The unions retaliated in a variety of ways, including a public relations campaign suggesting Eastern's airplanes were being improperly maintained because Lorenzo was inappropriately cutting costs. In March 1989, labor-management skirmishes turned into all-out war. Eastern's machinists went on strike, and the pilots and flight attendants initially joined in. The ensuing "no holds barred" battle between Lorenzo and the machinists led to losses on both sides.

Soon after the strike began, to put pressure on the unions and to avoid creditor claims, Eastern's management filed for bankruptcy, hired permanent replacements for the strikers, and began to sell off assets. While the pilots and flight attendants held out only a few months, the machinists union persisted in its strike, determined to get rid of Lorenzo at whatever cost. In one sense, they succeeded, for in 1990 the bankruptcy court forced Lorenzo to relinquish control of Eastern. It turned out to be a pyrrhic victory for the union, however, for on January 18, 1991, Eastern Airlines permanently shut down operations.[2]

The titanic struggle between Texaco and Pennzoil over Getty Oil provides another example of a bargaining failure, although of a somewhat more subtle sort. Here, both corporations survived, with a clear winner and loser; Texaco paid Pennzoil $3 billion in cash to end the dispute in 1988. The parties reached settlement, however, only after a year-long bankruptcy proceeding for Texaco and protracted legal wrangling in various courts. While the dispute dragged on, the combined equity value of the two companies was reduced by some $3.4 billion.[3] A settlement *before* Texaco filed for bankruptcy would have used up fewer social

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2. For the story of the battle between labor and management at Eastern Airlines, see AARON BERNSTEIN, GROUNDED: FRANK LORENZO AND THE DESTRUCTION OF EASTERN AIRLINES (1990).

3. *See* David M. Cutler and Lawrence H. Summers, *The Cost of Conflict Resolution and Financial Distress: Evidence from the Texaco-Pennzoil Litigation*, 19 RAND J. ECON. 157, 158 (1988).

resources and would have been more valuable to the shareholders of both companies than the resolution created by the bankruptcy court about a year later.[4]

My last example is an Art Buchwald story -- but it isn't a laughing matter, at least, not for Buchwald. He and his partner, Alain Bernheim, submitted Buchwald's two and a half page "treatment" for a story called "King for a Day" to Paramount Pictures pursuant to contracts providing that Bernheim would produce any film based on the story idea and that Buchwald and Bernheim would each share in the profits. In 1989, Buchwald and Bernheim sued Paramount for breach of contract.[5] They claimed that the studio had based Eddie Murphy's film, "Coming to America," on their treatment but had failed to give them their due. After three years of bitter litigation, a trial judge awarded Buchwald $150,000 and Bernheim $750,000. In the initial newspaper accounts, both sides claimed victory, but this is hardly an example of "win-win." Paramount claimed to be the winner because the legal fees of the plaintiffs' lawyers exceeded $2.5 million and the total recovery of only $900,000 was a small fraction of the $6.2 million Buchwald and Bernheim had requested in their final arguments. As it turns out, Buchwald and Bernheim will not have to pay the full legal fees because of a contingency arrangement with their law firm,[6] but Buchwald has acknowledged that his share of out-of-pocket expenses alone exceeds $200,000[7], and that as a consequence, he will have no net recovery.[8] On the other hand, Buchwald ridiculed

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4. For an extended analysis of this case, arguing that rational choices by each party led to less than optimum outcomes for both, see Robert H. Mnookin & Robert R. Wilson, *Rational Bargaining and Market Efficiency: Understanding* Pennzoil v. Texaco, 75 VA. L. REV. 295 (1989).

5. Robert W. Welkos and Terry Pristin, L.A. TIMES, Mar. 17, 1992, at B-1; L.A. DAILY J., Mar. 17, 1992, at 3. The case is described, from the perspective of Buchwald's lawyer, in PIERCE O'DONNELL & DENNIS MCDOUGAL, FATAL SUBTRACTION: HOW HOLLYWOOD REALLY DOES BUSINESS (1992).

6. Thus, Buchwald's lawyers -- the firm of Kaye, Scholer, Fierman, Hays & Handler, which has had more than its share of troubles in 1992 -- may have been the big loser. *See* Barbara Franklin, Buchwald v. Paramount: *Suit Attacks Hollywood's Idea of Sharing Profits*, N.Y. L.J., Jan. 3, 1991, at 5.

7. L.A. DAILY J., Mar. 17, 1992, at 3. In his introduction to a book about the case, Buchwald indicates that the "expenses came to $400,000 for Bernheim and myself." *See also*, O'DONNELL & MCDOUGAL, *supra* note 5, at xvii.

8. Buchwald has written:

> When I got involved, I expected to be in a business dispute that I assumed would be resolved early in the game for a minimal sum of money and, hopefully, an apology. . . . One of the discoveries of a suit such as this is that it makes you hurt deeply, and you don't forgive

Paramount's claim of victory. How, he asked, could it be a victory for a defendant to pay out nearly $1 million in damages, and, in addition, have legal fees of its own in excess of $3 million.[9] Seems like lose-lose to me.

On her death bed, Gertrude Stein was asked by Alice B. Toklas, "What is the answer? What is the answer?" After a long silence, Stein responded: "No, what is the question?"[10] Examples like these, and I am sure you could add many more of your own, suggest a central question for those of us concerned with dispute resolution: Why is it that under circumstances where there are resolutions that better serve disputants, negotiations often fail to achieve efficient resolutions? In other words, what are the barriers to the negotiated resolution of conflict?

II. BARRIERS TO THE NEGOTIATED RESOLUTION OF CONFLICT

In this evening's lecture, I will explore four such barriers.[11] Each of these barriers reflect somewhat different theoretical perspectives on negotiation and dispute resolution. The first barrier is a *strategic barrier*, which is suggested by game theory and the economic analysis of bargaining.[12] The barrier relates to an underlying dilemma inherent in the negotiation process. Every negotiation characteristically involves a tension between: (a) discovering shared interests and maximizing joint gains, and (b) maximizing one's own gains where more for one side will necessarily mean less for the other. The second barrier arises as a result of the *principal/agent* problem. In many disputes, principals do not negotiate on their own behalf but instead act through agents who may have somewhat different incentives than their principals. This work draws on research concerning the "principal/agent" problem in law and economics

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> easily. [Another thing I discovered] [d]o not count on any money in a lawsuit -- this is as true if you win as if you lose.

O'DONNELL & MCDOUGAL, *supra* note 5, at xvii-xviii.

9. Franklin, *supra* note 6, at 7.

10. F.W. Dupee, *General Introduction in* SELECTED WRITINGS OF GERTRUDE STEIN XVII 1990.

11. The Stanford Center on Conflict and Negotiation has been exploring various barriers to the negotiated resolution of conflict. A collection of essays on this topic, including the introductory chapter that I have co-authored with Lee Ross, is now in press, BARRIERS TO THE NEGOTIATED RESOLUTION OF CONFLICT (K. Arrow et al., eds., in press).

12. *See, e.g.*, AVINASH DIXIT & BARRY NALEBUFF, THINKING STRATEGICALLY: THE COMPETITIVE EDGE IN BUSINESS, POLITICS, AND EVERYDAY LIFE 1-7 (1991).

and transaction cost economics.[13] The third barrier is *cognitive*, and relates to how the human mind processes information, especially in evaluating risks and uncertainty. My discussion here draws on recent work in cognitive psychology, especially the pathbreaking research of my colleague, Amos Tversky and his collaborator, Daniel Kahneman.[14] The fourth and final barrier, "*reactive devaluation*," draws on the social psychological research of my colleague Lee Ross, and relates to the fact that bargaining is an interactive social process in which each party is constantly drawing inferences about the intentions, motives, and good faith of the other.[15]

As should be obvious, I am not attempting to provide a comprehensive list of barriers or an all-encompassing classification scheme. Instead, my purpose is to show that the concept of barriers provides a useful and necessarily interdisciplinary vantage point for exploring why negotiations sometimes fail. After describing these four barriers and their relevance to the study of negotiation, I will briefly suggest a variety of ways that neutral third parties might help overcome each of these barriers.

A. Strategic Barriers

The first barrier to the negotiated resolution of conflict is inherent in a central characteristic of negotiation. Negotiation can be metaphorically compared to making a pie and then dividing it up. The process of conflict resolution affects both the size of the pie, and who gets what size slice.

The disputants' behavior may affect the size of the pie in a variety of ways. On the one hand, spending on avoidable legal fees and other process costs shrinks the pie. On the other hand, negotiators can together "create value" and make the pie bigger by discovering resolutions in which each party contributes special complementary skills that can be combined in a synergistic way, or by exploiting differences in relative preferences that permit trades that make both parties better off.[16] Books like "Getting to Yes" and proponents of "win-win negotiation" emphasize the potential

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13. *See* OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTION OF CAPITALISM (1985); PAUL MILGROM & JOHN ROBERTS, ECONOMICS, ORGANIZATIONS AND MANAGEMENT (1992).

14. *See* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES, (Daniel Kahneman et al., eds., 1982).

15. Constance A. Stillinger et al., *The 'Reactive Devaluation' Barrier to Conflict Resolution*, J. OF PERSONALITY AND SOC. PSYCHOL. (under review).

16. JOHN MCMILLAN, GAMES, STRATEGIES, AND MANAGERS 45 (1992).

benefits of collaborative problem-solving approaches to negotiation which allow parties to maximize the size of the pie.[17]

Negotiation also involves issues concerning the distribution of benefits, and, with respect to pure distribution, both parties cannot be made better off at the same time. Given a pie of fixed size, a larger slice for you means a smaller one for me.

Because bargaining typically entails both efficiency issues (that is, how big the pie can be made) and distributive issues (that is, who gets what size slice), negotiation involves an inherent tension -- one that David Lax and James Sebenius have dubbed the "negotiator's dilemma."[18] In order to create value, it is critically important that options be created in light of both parties' underlying interests and preferences. This suggests the importance of openness and disclosure, so that a variety of options can be analyzed and compared from the perspectives of all concerned. However, when it comes to the distributive aspects of bargaining, full disclosure -- particularly if unreciprocated by the other side -- can often lead to outcomes in which the more open party receives a comparatively smaller slice. To put it another way, unreciprocated approaches to creating value leave their maker vulnerable to claiming tactics. On the other hand, focusing on the distributive aspects of bargaining can often lead to unnecessary deadlocks and, more fundamentally, a failure to discover options or alternatives that make both sides better off. A simple example can expose the dilemma. The first involves what game theorists call "information asymmetry."[19] This simply means each side to a negotiation characteristically knows some relevant facts that the other side does not know.

Suppose I have ten apples and no oranges, and Nancy Rogers has ten oranges and no apples. (Assume apples and oranges are otherwise unavailable to either of us.) I love oranges and hate apples. Nancy likes them both equally well. I suggest to Nancy that we might both be made better off through a trade. If I disclose to Nancy that I love oranges and don't eat apples, and Nancy wishes to engage in strategic bargaining, she might simply suggest that her preferences are the same as mine, although, in truth, she likes both. She might propose that I give her nine apples (which she says have little value to her) in exchange for one of her very valuable oranges. Because it is often very difficult for one party to know the underlying preferences of the other party, parties in a negotiation may

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17. ROGER FISHER, WILLIAM URY, & BRUCE PATTON, GETTING TO YES (2nd ed. 1991).

18. DAVID A. LAX & JAMES K. SEBENIUS, THE MANAGER AS NEGOTIATOR (1986).

19. ERIC RASMUSSEN, GAMES AND INFORMATION: AN INTRODUCTION TO GAME THEORY 107 (1989).

puff, bluff, or lie about their underlying interests and preferences.[20] Indeed, in many negotiations, it may never be possible to know whether the other side has honestly disclosed its interests and preferences. I have to be open to create value, but my openness may work to my disadvantage with respect to the distributive aspect of the negotiation.

Even when both parties know all the relevant information, and that potential gains may result from a negotiated deal, strategic bargaining over how to divide the pie can still lead to deadlock (with no deal at all) or protracted and expensive bargaining, thus shrinking the pie. For example, suppose Nancy has a house for sale for which she has a reservation price of $245,000. I am willing to pay up to $295,000 for the house. Any deal within a bargaining range from $245,000 to $295,000 would make both of us better off than no sale at all. Suppose we each know the other's reservation price. Will there be a deal? Not necessarily. If we disagree about how the $50,000 "surplus" should be divided (each wanting all or most of it), our negotiation may end in a deadlock. We might engage in hardball negotiation tactics in which each tried to persuade the other that he or she was committed to walking away from a beneficial deal, rather than accept less than $40,000 of the surplus. Nancy might claim that she won't take a nickel less than $285,000, or even $294,999 for that matter. Indeed, she might go so far as to give a power of attorney to an agent to sell only at that price, and then leave town in order to make her commitment credible. Of course, I could play the same type of game and the result would then be that no deal is made and that we are both worse off. In this case, the obvious tension between the distribution of the $50,000 and the value creating possibilities inherent in any sale within the bargaining range may result in no deal.

Strategic behavior -- which may be rational for a self-interested party concerned with maximizing the size of his or her own slice -- can often lead to inefficient outcomes. Those subjected to claiming tactics often respond in kind, and the net result typically is to push up the cost of the dispute resolution process. (*Buchwald v. Paramount Pictures Corp.*,[21] is a good example of a case in which the economic costs of hardball litigation obviously and substantially shrunk the pie.) Parties may be tempted to engage in strategic behavior, hoping to get more. Often all they do is shrink the size of the pie. Those experienced in the civil litigation process see this all the time. One or both sides often attempt to use pre-trial discovery as leverage to force the other side into agreeing to a more favorable settlement. Often the net result, however, is simply that

20. *Id.* at 205.

21. No. C 706083, 1990 WL 357611 (Cal.Superior Jan. 8, 1990).

both sides spend unnecessary money on the dispute resolution process.

B. The Principal/Agent Problem

The second barrier is suggested by recent work relating to transaction cost economics, and is sometimes called the "principal/agent" problem.[22] Notwithstanding the jargon, the basic idea is familiar to everyone in this room. The basic problem is that the incentives for an agent (whether it be a lawyer, employee, or officer) negotiating on behalf of a party to a dispute may induce behavior that fails to serve the interests of the principal itself. The relevant research suggests that it is no simple matter -- whether by contract or custom -- to align perfectly the incentives for an agent with the interests of the principal.[23] This divergence may act as a barrier to efficient resolution of conflict.

Litigation is fraught with principal/agent problems. In civil litigation, for example -- particularly where the lawyers on both sides are being paid by the hour -- there is very little incentive for the opposing lawyers to cooperate, particularly if the clients have the capacity to pay for trench warfare and are angry to boot. Commentators have suggested that this is one reason many cases settle on the courthouse steps, and not before: for the lawyers, a late settlement may avoid the possible embarrassment of an extreme outcome, while at the same time providing substantial fees.[24]

The Texaco/Pennzoil dispute may have involved a principal/agent problem of a different sort. My colleague Bob Wilson and I have argued that the interests of the Texaco officers and directors diverged from those of the Texaco shareholders in ways that may well have affected the conduct of that litigation.[25] Although the shareholders would have benefitted from an earlier settlement, the litigation was controlled by the directors, officers, and lawyers whose interests differed in important respects. A close examination of the incentives for the management of Texaco in particular suggests an explanation for the delay in settlement.

The directors and officers of Texaco were themselves defendants in fourteen lawsuits, eleven of them derivative shareholder actions, brought after the original multi-billion dollar Pennzoil verdict in the Texas trial court. These lawsuits essentially claimed that Texaco's directors and

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22. RASMUSSEN, *supra* note 19, at 136.

23. DREW FUDENBERG & JEAN TIROLE, GAME THEORY 297 (1991).

24. P'ng, *Strategic Behavior in Suit, Settlement, and Trial*, 14 BELL J. ECON. 539 (Autumn 1983).

25. Mnookin & Wilson, *supra* note 4, at 295, 315-323.

officers had violated their duty of care to the corporation by causing Texaco to acquire Getty Oil in a manner that led to the multi-billion dollar Texas judgment.[26] After this verdict, and for the next several years, the Texaco management rationally might have preferred to appeal the Pennzoil judgment and seek complete vindication, even though a speedy settlement for the expected value of the litigation might have better served their shareholders. Because they faced the risk of personal liability, the directors and officers of Texaco acted in such a way as to suggest they would prefer to risk pursuing the case to the bitter end (with some slight chance of complete exoneration) rather than accept a negotiated resolution, even though in so doing they risked subjecting the corporation to a ten billion dollar judgment. The case ultimately did settle, but only through a bankruptcy proceeding in which the bankruptcy court eliminated the risk of personal liability for Texaco's officers and directors.[27]

C. Cognitive Barriers.

The third barrier is a by-product of the way the human mind processes information, deals with risks and uncertainties, and makes inferences and judgments. Research by cognitive psychologists during the last fifteen years suggests several ways in which human reasoning often departs from that suggested by theories of rational judgment and decision making.[28] Daniel Kahneman and Amos Tversky have done research on a number of cognitive biases that are relevant to negotiation.[29] This evening, I would like to focus on two aspects of their work: those relating to loss aversion and framing effects.

Suppose everyone attending this evening's lecture is offered the following happy choice: At the end of my lecture you can exit at the north end of the hall or the south end. If you choose the north exit, you will be handed an envelope in which there will be a crisp new twenty dollar bill. Instead, if you choose the south exit, you will be given a sealed envelope randomly pulled from a bin. One quarter of these envelopes contain a $100 bill, but three quarters are empty. In other

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26. In 1985, a Texas jury awarded $7.53 billion in compensatory damages and $3 billion in punitive damages to Pennzoil. *See* Texaco, Inc. v. Pennzoil Co., 626 F. Supp. 250 (S.D.N.Y. 1986).

27. Mnookin & Wilson, *supra* note 4.

28. Amos Tversky et al., *Contingent Weighting in Judgment and Choice*, 95 PSYCHOL. REV. 371-384 (July 1988).

29. For a discussion of various cognitive barriers, see Daniel Kahneman and Amos Tversky, *Conflict Resolution: A Cognitive Perspective*, *in* BARRIERS TO CONFLICT RESOLUTION (K. Arrow et al. eds., in press).

words, you can have a sure gain of $20 if you go out the north door, or you can instead gamble by choosing the south door where you will have a 25% chance of winning $100 and a 75% chance of winning nothing. Which would you choose? A great deal of experimental work suggests that the overwhelming majority of you would choose the sure gain of $20, even though the "expected value" of the second alternative, $25, is slightly more. This is a well known phenomenon called "risk aversion." The principle is that most people will take a sure thing over a gamble, even where the gamble may have a somewhat higher "expected" payoff.

Daniel Kahneman and Amos Tversky have advanced our understanding of behavior under uncertainty with a remarkable discovery. They suggest that, in order to avoid what would otherwise be a sure loss, many people will gamble, even if the expected loss from the gamble is larger. Their basic idea can be illustrated by changing my hypothetical. Although you didn't know this when you were invited to this lecture, it is not free. At the end of the lecture, the doors are going to be locked. If you go out the north door, you'll be required to *pay* $20 as an exit fee. If you go out the south door, you'll participate in a lottery by drawing an envelope. Three quarters of the time you're going to be let out for free, but one quarter of the time you're going to be required to pay $100. Rest assured all the money is going to the Dean's fund -- a very good cause. What do you choose? There's a great deal of empirical research, based on the initial work of Kahneman and Tversky, suggesting that the majority of this audience would choose the south exit -- i.e., most of you would gamble to avoid having to lose $20 for sure. [30] Kahneman and Tversky call this "loss aversion."

Now think of these two examples together. Risk aversion suggests that most of you would not gamble for a gain, even though the expected value of $25 exceeds the sure thing of $20. On the other hand, most of you would gamble to avoid a sure loss, even though, on the average, the loss of going out the south door is higher. Experimental evidence suggests that the proportion of people who will gamble to avoid a loss is much greater than those who would gamble to realize a gain.

Loss aversion can act as a cognitive barrier to the negotiated resolution of conflict for a variety of reasons. For example, both sides may fight on in a dispute in the hope that they may avoid any losses, even though the continuation of the dispute involves a gamble in which the loss may end up being far greater. Loss aversion may explain Lyndon Johnson's decision, in 1965, to commit additional troops to Vietnam as an

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30. Amos Tversky & Richard Thaler, *Anomalies: Preference Reversals*, 4 J. ECON. PERSPECTIVES 201 (Spring 1990); Amos Tversky et al., *The Causes of Preference Reversals* 80 AM. ECON. REV. 204 (March 1990).

attempt to avoid the sure loss attendant to withdrawal, and as a gamble that there might be some way in the future to avoid any loss at all. Similarly, negotiators may, in some circumstances, be adverse to offering a concession in circumstances where they view the concession as a sure loss. Indeed, the notion of rights or entitlements may be associated with a more extreme form of loss aversion that Kahneman and Tversky call "enhanced loss aversion," because losses "compounded by outrage are much less acceptable than losses that are caused by misfortune or by legitimate actions of others."[31]

One of the most striking features of loss aversion is that whether something is viewed as a gain or loss -- and what kind of gain or loss it is considered -- depends upon a reference point, and the choice of a reference point is sometimes manipulable. Once again, a simple example suggested by Kahneman and Tversky, can illustrate.

Suppose you and a friend decide to go to Cleveland for a big night out on the town. You've made reservations at an elegant restaurant that will cost $100 a couple. In addition, you've bought two superb seats -- at $50 each -- to hear the Cleveland orchestra. You set off for Cleveland, thinking you have your symphony tickets and $100, but no credit cards.

Imagine that you park your car in Cleveland and make a horrifying discovery -- you've lost the tickets. Assume that you cannot be admitted to the symphony without tickets. Also imagine that someone is standing in front of the Symphony Hall offering to sell two tickets for $100. You have a choice. You can use the $100 you intended for the fancy dinner to buy the tickets to hear the concert, or you can skip the concert and simply go to dinner. What would you do?

Consider a second hypothetical. After you park your car, you look in your wallet and you realize to your horror that the $100 is gone, but the tickets are there. In front of the Symphony Hall is a person holding a small sign indicating she would like to buy two tickets for $100. What do you do? Do you sell the tickets and go to dinner? Or do you instead skip dinner and simply go to the concert?

Experimental research suggests that in the first example many more people will skip the symphony and simply go out to dinner, while in the second example, the proportions are nearly reversed; most people would skip dinner and go to the concert.[32] The way we keep our mental accounts is such that, in the first instance, to buy the tickets a second time would somehow be to overspend our ticket budget. And, yet, an

31. Kahneman et al., *supra* note 14.

32. *Id.*

economist would point out that the two situations are essentially identical because there is a ready and efficient market in which you can convert tickets to money or money to tickets.

The purpose of the hypotheticals is to suggest that whether or not an event is framed as a loss can often affect behavior. This powerful idea concerning "framing" has important implications for the resolution of disputes to which I will return later.

D. "Reactive Devaluation" of Compromises and Concessions.

The final barrier I wish to discuss is "reactive devaluation," and is an example of a social/psychological barrier that arises from the dynamics of the negotiation process and the inferences that negotiators draw from their interactions. My Stanford colleague, psychology Professor Lee Ross, and his students have done experimental work to suggest that, especially between adversaries, when one side offers a particular concession or proposes a particular exchange of compromises, the other side may diminish the attractiveness of that offer or proposed exchange simply because it originated with a perceived opponent. The basic notion is a familiar one, especially for lawyers. How often have you had a client indicate to you in the midst of litigation, "If only we could settle this case for $7,000. I'd love to put this whole matter behind me." Lo and behold, the next day, the other side's attorney calls and offers to settle for $7,000. You excitedly call your client and say, "Guess what -- the other side has just offered to settle this case for $7,000." You expect to hear jubilation on the other end of the phone, but instead there is silence. Finally, your client says, "Obviously they must know something we don't know. If $7,000 is a good settlement for them, it can't be a good settlement for us."

Both in laboratory and field settings, Ross and his colleagues have marshalled interesting evidence for "reactive devaluation." They have demonstrated both that a given compromise proposal is rated less positively when proposed by someone on the other side than when proposed by a neutral or an ally. They also demonstrated that a concession that is actually offered is rated lower than a concession that is withheld, and that a compromise is rated less highly after it has been put on the table by the other side than it was beforehand.[33]

An example which should provide the flavor of this research is

33. *See* Stillinger et al., *supra* note 15. *See also*, Lee Ross & Constance Stillinger, *Barriers to Conflict Resolution*, 7 NEGOTIATION J. 389 (Oct. 1991).

the work of Ross and his colleagues.[34] One study took place in the context of a campus-wide controversy at Stanford over university investment policy concerning companies that did business with South Africa. Ross and his colleagues asked Stanford students to consider two compromise proposals. One proposal, termed the "specific divestment plan," entailed immediate Stanford divestment from corporations doing business with the South African military or police. The other, so-called "deadline plan," proposed to create a committee of students and trustees to monitor investment responsibility, with the promise of total divestment two years down the road if the committee was not satisfied with the rate of progress shown in dismantling the apartheid system in South Africa.

The experiment went as follows: one group of randomly assigned students was told that the University planned to undertake specific divestment, another group was told that the University planned to undertake the deadline plan, the remainder were given no specific reason to believe that the university was considering the immediate adoption of either alternative. The students were asked which plan they preferred. Students tended to denigrate whichever of the two compromise proposals the trustees had been said to offer, and to prefer the alternative proposal. When told that Stanford was allegedly ready to implement the deadline plan, 85% of the respondents ranked specific divestment as the preferred move. By contrast, when the university purportedly was going to pursue specific divestment, 60% rated that plan worse than the deadline plan.

Ross has described a range of cognitive and motivational processes that may account for the reactive devaluation phenomenon.[35] Whatever its roots, reactive devaluation certainly can act as a barrier to the efficient resolution of conflict. It suggests that the exchange of proposed concessions and compromises between adversaries can be very problematic. When one side unilaterally offers a concession that it believes the other side should value and the other side reacts by devaluing the offer, this can obviously make resolution difficult. The recipient of a unilateral concession is apt to believe that her adversary has given up nothing of real value and may therefore resist any notion that she should offer something of real value in exchange. On the other hand, the failure to respond may simply confirm the suspicions of the original offeror, who will believe that her adversary is proceeding in bad faith and is being strategic.

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34. Rob J. Robinson et al., *Misconstruing the Views of the 'Other Side': Real and Perceived Differences in Three Ideological Conflicts,* Stanford Center on Conflict and Negotiation Working Paper No. 18 (June 1990).

35. *Id.*

III. OVERCOMING STRATEGIC BARRIERS: THE ROLES OF NEGOTIATORS AND MEDIATORS

The study of barriers can do more than simply help us understand why negotiations sometimes fail when they should not. It can also contribute to our understanding of how to overcome these barriers. Let me illustrate this by using the preceding analysis of four barriers briefly to explore the role of mediators, and to suggest why neutrals can often facilitate the efficient resolution of disputes by overcoming these specific barriers.

First, let us consider the strategic barrier. To the extent that a neutral third party is trusted by both sides, the neutral may be able to induce the parties to reveal information about their underlying interests, needs, priorities, and aspirations that they would not disclose to their adversary. This information may permit a trusted mediator to help the parties enlarge the pie in circumstances where the parties acting alone could not. Moreover, a mediator can foster a problem-solving atmosphere and lessen the temptation on the part of each side to engage in strategic behavior. A skilled mediator can often get parties to move beyond political posturing and recriminations about past wrongs and to instead consider possible gains from a fair resolution of the dispute.

A mediator also can help overcome barriers posed by principal/agent problems. A mediator may bring clients themselves to the table, and help them understand their shared interest in minimizing legal fees and costs in circumstances where the lawyers themselves might not be doing so. In circumstances where a middle manager is acting to prevent a settlement that might benefit the company, but might be harmful to the manager's own career, an astute mediator can sometimes bring another company representative to the table who does not have a personal stake in the outcome.

A mediator can also promote dispute resolution by helping overcome cognitive barriers. Through a variety of processes, a mediator can often help each side understand the power of the case from the other side's perspective. Moreover, by reframing the dispute and suggesting a resolution that avoids blame and stresses the positive aspects of a resolution, a mediator may be able to lessen the effects of loss aversion. My colleague Tversky thinks that cognitive barriers are like optical illusions -- knowing that an illusion exists does not necessarily enable us to see things differently.[36] Nevertheless, I believe that astute mediators can dampen loss aversion through reframing, by helping a disputant

36. Tversky & Thaler, *supra* note 30.

reconceptualize the resolution. By emphasizing the potential gains to both sides of the resolution and de-emphasizing the losses that the resolution is going to entail, mediators (and lawyers) often facilitate resolution.

With respect to the fourth barrier, reactive devaluation, mediators can play an important and quite obvious role. Reactive devaluation can often be sidestepped if the source of a proposal is a neutral -- not one of the parties. Indeed, one of the trade secrets of mediators is that after talking separately to each side about what might or might not be acceptable, the mediator takes responsibility for making a proposal. This helps both parties avoid reactive devaluation by allowing them to accept as sensible a proposal that they might have rejected if it had come directly from their adversary.

IV. CONCLUSION

In closing, I would like to leave you with three basic ideas. The first idea concerns the importance of the basic question around which this evening's lecture has been organized: What are the barriers to the efficient and fair resolution of conflict? I hope that you agree that this question is profoundly important, not only for those of us who are researchers, but for those who are practitioners as well.

The second idea concerns the inherently interdisciplinary nature of our field. In this lecture, I have shown how barriers can be explored from a variety of different perspectives. I have drawn on work relating to the game theory and the economics of bargaining, principal/agent economics, cognitive psychology, and social psychology. Other disciplines also have much to offer. Our understanding of conflict resolution would surely be enriched by careful exploration of barriers from the perspectives of other social sciences, such as anthropology, sociology, political science, and from the humanities. History, literature, and theology all offer useful contributions.

The third idea is a corollary of the second. No theoretical perspective, and no single discipline, has a monopoly on useful insights concerning the barriers to the fair and efficient resolution of conflict. Indeed, progress with respect to our understanding of conflict is going to turn very fundamentally on the ability of people from different disciplines to learn from one another and work together to improve both theory and practice. One goal of this research should be not simply to better understand why negotiations fail, but to help us learn -- whether as parties or as neutrals -- to overcome the barriers to the negotiated resolution of conflict.